

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID EARL FISHER,

Defendant-Appellant.

UNPUBLISHED

January 30, 2007

No. 262941

Tuscola Circuit Court

LC No. 03-008955-FH

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of delivery/manufacture of marijuana, second offense, MCL 333.7401(2)(d)(3) and MCL 333.7413(2); maintaining a drug house, MCL 333.7405(1)(d), and possession of marijuana, MCL 333.7403(2)(d). For those respective convictions, he was sentenced to concurrent prison terms of three to eight years, one-and-a-half to three years, and six to twelve months. We affirm.

I. Basic Facts And Procedure

During a search of defendant's home, officers found marijuana paraphernalia and marijuana plants in various stages of development (from seed to processed marijuana) in every room of defendant's home except for the bathroom and kitchen. An officer testified that he found a firearm in the only bedroom in the home. His wife claimed the firearm belonged to her alone, defendant did not know she had it, and defendant never entered the only bedroom in the house, as that was exclusively her space.

Defendant was charged with delivery/manufacture of marijuana (second offense), maintaining a drug house, possession of marijuana, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission on a felony, MCL 750.227b. His wife was charged with the same charges except for possession of a firearm by a felon. The two were tried together as they stipulated to a joint trial. The same retained counsel also represented them. After instructing the jury, the trial court provided each juror with a written copy of all the elements of the crimes charged.

During deliberations, the jury asked the trial court whether possession of marijuana would automatically require a conviction for maintaining a drug house. The trial court simply

directed the jurors to consider the written elements of the crime that had been provided to them. The jury then found defendant guilty of all charges except for the firearm charges.

II. Analysis

1. Effective Assistance Of Counsel

Defendant first argues that he was denied the effective assistance of counsel due to a conflict of interest stemming from defense counsel's joint representation of him and his wife. We disagree.

Because a *Ginther*¹ hearing was not held, this Court's review is limited to errors apparent on the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

To show a violation of the Sixth Amendment right to the effective assistance of counsel based on joint representation, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v Sullivan*, 446 US 335, 348; 100 S Ct 1708; 64 L Ed 2d 333 (1980). However, the mere possibility of a conflict of interest does not constitute ineffective assistance of counsel. *Id.* at 350. Defendant has not pointed to any act or omission by defense counsel that would demonstrate an actual conflict of interest by defense counsel. Defendant instead emphasizes statements made by defense counsel during closing argument that the evidence against defendant's wife was weaker with regard to the drug charges and argues that these statements inherently implicated defendant. However, defense counsel also argued that the weapons charges were weaker against defendant because of his wife's testimony that she alone knew about the firearm kept in the home. In light of these arguments by defense counsel, the following analysis from *People v Tillman*, 59 Mich App 768, 773; 229 NW2d 922 (1975), is applicable:

However, a close reading of counsel's argument in context discloses that counsel was arguing that the evidence presented was insufficient to warrant a guilty verdict against defendant and was even less convincing with respect to codefendant.... Counsel did not sacrifice defendant's interests but rather pointed out that neither he nor codefendant ... should be convicted. The mere fact that counsel pointed out that the state's case against codefendant ... was weaker than that against the defendant does not support the claim that defendant was prejudiced by the joint representation....

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Although defendant filed a motion in this Court to remand for a *Ginther* hearing, the motion was denied because defendant failed to provide this Court with an adequate affidavit and offer of proof for the facts to be established at a hearing.

Pointing out that the evidence was weaker with respect to defendant's wife arguably implicated defendant because only they lived in the house, and it could be inferred that at least one of them had to have been growing marijuana. However, the decision to emphasize the wife's testimony and to not challenge her constituted sound trial strategy.² The same strategy might reasonably have been used even if both defendant and his wife had separate representation. That is, defendant's wife essentially testified that she and defendant each used certain parts of the home exclusive of the other and that she never entered the portions of the home where marijuana was grown or processed. This separate-spaces theory actually helped defendant because the wife further testified that defendant never entered her bedroom where she kept a firearm for the past eight years. Defendant, as a convicted felon, was charged with both felony-firearm and felon in possession of a firearm. Without the wife's testimony, the jury would have been presented with evidence that a firearm was openly kept in the only room in a married couple's home with a bed, when defendant was a convicted felon and marijuana was being grown throughout the home.

A defendant arguing that counsel was constitutionally ineffective "must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Riley, supra*, 140. Because defendant has not demonstrated any actual conflict of interest in defense counsel's joint representation, his argument that counsel was constitutionally ineffective must fail.³

2. Due Process In Jury Instruction

Defendant next argues that the trial court denied him due process when it referred the jury to the written instructions of the crime of maintaining a drug house in response to its question. We disagree.

"Claims of instructional error are reviewed de novo." *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). "Jury instructions should be considered as a whole rather than extracted piecemeal to establish error. Even if the instructions were somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999) (citations omitted). However, "[t]he decision to provide additional instructions at the request of the jury is a matter within the discretion of the trial court." *People v Fisher*, 166 Mich App 699, 714; 420 NW2d 858 (1988), citing *People v Martin*, 392 Mich 553, 558; 221 NW2d 336 (1974).

The trial court did not abuse its discretion when it referred the jury to the written instructions in response to the question because the instructions, which defendant did not object

² See *Riley, supra*, 140, which provides that defense counsel's tactics are presumed to be sound trial strategy.

³ Although defendant argues that MCR 6.005(G) obligated defense counsel to inform the trial court when a conflict of interest developed, this obligation is not triggered unless and until a conflict of interest actually arises. "An attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." *Cuyler, supra* at 347 (citations and internal quotations omitted). Again, defendant has not shown that a conflict of interest developed, so MCR 6.005(G) did not obligate defense counsel to take such action.

to, “fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Henry, supra*, 151. These instructions also adequately addressed the jury’s question. Thus, by referring the jury to the instructions rather than providing the answer suggested by defendant, the trial court properly directed the jury to determine whether all of the elements of the crime were met beyond a reasonable doubt.

3. Resentencing

Defendant next argues he is entitled to resentencing on the charge of delivery/manufacture of marijuana because the trial court enhanced his sentence under both MCL 333.7413(2) (the health code enhancement) and MCL 769.10 (the habitual offender statute). We disagree.

Defendant did not object at sentencing that the trial court erred in applying both sentence enhancements. Therefore, this issue is not preserved. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). A sentence will not be reversed for an unpreserved sentencing error unless there was plain error affecting the defendant’s substantial rights. *People v Endres*, 269 Mich App 414, 422; 711 NW2d 398 (2006).

The judgment of sentence shows that the trial court enhanced defendant’s sentence for delivery/manufacture of marijuana under MCL 333.7413(2) (health code enhancement) because the health code enhancement is listed in the same box as the statute for delivery/manufacture of a controlled substance, MCL 333.7401(2)(d)(iii). Arguably, the judgment of sentence also indicates that the trial court applied the habitual offender statute, MCL 769.10. However, that statute is listed in a box separate from all charges. This Court has held that “the Legislature did not intend that a sentence for a subsequent drug offense be quadrupled by enhancement under both” the habitual offender statute and the health code. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). Thus, if the trial court applied both enhancements to defendant’s sentence for delivery/manufacture, then it would have committed error, requiring reversal. However, there is simply no indication that the trial court applied the habitual offender enhancement to defendant’s sentence for delivery/manufacture of marijuana.

MCL 333.7413(2) allows a trial court to double a sentence when a person is convicted of a second or subsequent violation of article 7 of the public health code (i.e., MCL 333.7101 to 333.7545). Here, the trial court doubled defendant’s maximum sentence under MCL 333.7401(2)(d)(iii) to eight years. If the trial court had in fact applied both the health code enhancement and the habitual offender enhancement to defendant’s delivery/manufacture sentence, then it would have tripled his maximum sentence to twelve years because MCL 769.10(1)(a) allows the court to impose a sentence 1.5 times greater. Further, in cases cited by defendant where the sentences were overturned for applying both the health code enhancement and the habitual-offender enhancement, the sentencing court clearly multiplied the regular sentence by the factors allowed under both enhancement provisions. See *Fetterley, supra* at 511; *People v Elmore*, 94 Mich App 304, 305-306; 288 NW2d 416 (1979); *People v Edmonds*, 93 Mich App 129, 135; 285 NW2d 802 (1979) (all of which held that the sentencing court could not *quadruple* a sentence under the health code and the habitual offender statute).

None of the cases cited by defendant on this issue suggest that a trial court erroneously enhances a sentence under both the health code and the habitual offender statute by multiplying

the sentence times the factor allowed under the health code and then merely listing the habitual offender statute on the judgment of sentence. Moreover, the unpreserved nature of this issue demonstrates the need to object below to enable the trial court to address and correct an alleged error and to provide for meaningful review. See *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006), citing *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994). Had defendant objected below that the trial court improperly considered both enhancement provisions, then the court could have clarified under which authority it had doubled defendant's sentence. Because it is not clear whether the trial court considered both enhancements and because the trial court could have doubled the maximum sentence under the health code enhancement alone, defendant has not shown that a plain error occurred. His argument in this regard must therefore fail. See *Endres*, *supra* at 422.

4. No Sentencing Departure

Finally, defendant argues that the trial court did not have substantial and compelling reasons to depart from the sentencing guidelines and double his minimum sentence for delivery/manufacture of marijuana; however, it is immaterial whether the trial court had substantial and compelling reasons to depart from the sentencing guidelines because the minimum sentence was within the range allowed for by the guidelines, i.e., the court did not depart at all.

Defendant did not object at sentencing that the sentence exceeded the sentencing guidelines, so this issue is not preserved. *Stanaway*, *supra* at 694. A sentence will not be reversed for an unpreserved sentencing error unless there was plain error affecting the defendant's substantial rights. *Endres*, *supra* at 422. "If the trial court's sentence is within the guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence. MCL 769.34(10)." *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). If the sentencing court departs from the sentencing guidelines, it must articulate a substantial and compelling reason on the record for its departure, and that reason must also be objective and verifiable *Id.* at 272-273. Whether a factor is objective and verifiable is reviewed de novo. *Id.*

Defendant argues that MCL 769.34(4)(d)⁴ required the trial court to impose a sentence within the recommended range. Although the trial court acknowledged that the guidelines called for a minimum sentence range of 0 to 21 months for delivery/manufacture of marijuana, it stated that defendant's attitude toward marijuana use, as expressed at the sentencing hearing, would justify a departure from the guidelines. Despite its statement at sentencing, the trial court did not in fact depart from the sentencing guidelines.

In *People v Williams*, 268 Mich App 416, 428; 707 NW2d 624 (2005), this Court held that under MCL 333.7413(2) "a sentencing court can double both the statutorily allowed maximum sentence and any statutory minimum sentence." *Williams* is indistinguishable from

⁴ Although defendant erroneously cites a prior version of MCL 769.34, subsection (c) of the then applicable and now current version is identical to subsection (d).

the instant case. Like the defendant in *Williams*, defendant here had his sentence for a subsequent marijuana conviction enhanced under MCL 333.7413(2) and similarly argues that the Court improperly increased his minimum sentence from the range recommended in the sentencing guidelines. *Williams, supra* at 426-429. The only notable difference between the two cases is that the sentencing court in *Williams* expressly held that it could double the minimum sentence under MCL 333.7413(2), *Williams, supra* at 425, while the trial court in this case erroneously stated that it exceeded the sentencing guidelines for the minimum sentence. Under *Williams*, it did not. We decline to consider whether the trial court could have properly departed from the sentencing guidelines because under *Williams* the minimum sentence for delivery/manufacture of marijuana does not exceed the enhanced minimum. See *id* at 430-431 (holding that the sentencing court need not even articulate a reason for departing from the sentencing guidelines when the sentence imposed was within the amount allowed under MCL 333.7413[2]). Here, it is undisputed that the minimum sentence range was 0 to 21 month, and defendant's sentence of three years was clearly less than double the upper range of the recommended minimum.

Even assuming that the trial court had departed from the guidelines, we would hold that the departure was justified. The trial court stated that defendant's actions and attitude at sentencing demonstrated that he would continue to use marijuana despite the law and that he would not be rehabilitated. Defendant's expressed intent to continue using marijuana despite the law⁵ is objective and verifiable. Hence, the trial court properly exercised its discretion in concluding that this factor provided a substantial and compelling reason to depart from the sentencing guidelines. See *People v Schaafsma*, 267 Mich App 184, 186; 704 NW2d 115 (2005).

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra

⁵ At the sentencing hearing, defendant stated: "I don't think you should smoke marijuana any time you want. There are places and a time for it. No driving, children."